The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-002765

Senator Hellen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600
Scrutiny.sen@aph.gov.au

19 APR 2018

Dear ~~Chair~~ Hellen

As Acting Attorney-General, I am writing in response to the letter from the Committee Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee), Ms Anita Coles, dated 21 March 2018. The letter refers to the Committee's *Scrutiny Digest No.3 of 2018* and seeks the Attorney-General's advice in relation to the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 (the Bill).

Significant matters in delegated legislation

The Committee has requested the Attorney-General's advice in relation to:

- why it is considered necessary and appropriate to allow the Minister to determine certain eligibility requirements for entering into debt agreements by delegated legislation, and
- the appropriateness of amending the Bill to set a minimum threshold on the percentage that the Minister may determine under proposed subsection 185C(4B).

Proposed paragraph 185C(4)(e) of the Bill introduces a requirement for debt agreement proposals to satisfy a payment to income ratio, to be determined by the Minister by legislative instrument under proposed subsection 185C(4B). Proposed subsection 185M(1E) introduces this same requirement for proposals to vary a debt agreement.

The proposed payment to income ratio is intended to prevent the establishment and continued operation of debt agreements with the most excessive debt repayment schedules. The ratio would supplement existing measures in the *Bankruptcy Act 1966* (the Act) which currently function to prevent most debt agreements with unaffordable debt repayment schedules. Paragraph 185C(2D)(c) of the Act, for example, requires a debt agreement administrator to certify that the debtor can discharge their obligations under the agreement. Unlike the proposed payment to income ratio, paragraph 185C(2D)(c) requires the administrator to assess the debtor's individual financial circumstances on a case-by-case basis.

However, should these existing safeguards fail, for example due to administrator malfeasance, the ratio will operate to prevent the most excessive debt repayment schedules which have the potential to cause significant harm to debtors. The power to determine the ratio will not significantly alter the eligibility requirements for entering into a debt agreement, as it will only be exercised in a manner that captures these outliers. The explanatory memorandum will be amended to clarify this objective.

Noting the above, it is therefore appropriate to maintain the flexibility of setting the ratio's percentage by legislative instrument. The percentage may need to be amended quickly in light of the fluctuating nature of the financial market, and in consideration of the significant harm that may be experienced by debtors if the percentage is or becomes unsuited to market conditions. This percentage will be developed in consultation with key industry stakeholders.

I further advise that it would be inappropriate to amend the Bill to set a minimum threshold on the percentage that the Minister may determine. As the payment to income ratio will only safeguard against the most excessive debt repayment schedules, and will not significantly alter the eligibility requirements for entering into a debt agreement, it is not necessary for the Bill to set a minimum threshold.

Custodial penalties of less than six months

The Committee also sought more detailed justification for setting a custodial penalty of three months' imprisonment in relation to the offences in proposed subsections 185EC(6), 185MC(6) and 185PC(6) instead of a pecuniary penalty.

The proposed new subsections make it an offence for a debt agreement administrator to give or offer to give a creditor valuable consideration with a view to securing the creditor's acceptance of a proposal to establish, vary or terminate a debt agreement.

These provisions are intended to deter serious financial misconduct. By establishing or prolonging debt agreements, debt agreement administrators stand to earn substantial financial gain. However, entering into unaffordable debt agreements can have serious financial consequences for both debtors and creditors. Debtors, in particular, can potentially endure severe financial hardship by entering into agreements with unreasonable rates of return.

Debt agreement administrators, acting as agents for financially vulnerable debtors, occupy important positions of trust. Inducing creditors to accept an unaffordable debt agreement, often at significant detriment to the debtor, represents an egregious breach of that trust.

I therefore submit that an imprisonment penalty for this type of offence is warranted. A maximum penalty of a term of imprisonment would provide a more effective deterrent to the commission of the offence, and better reflects the seriousness of the offence than a pecuniary penalty. An imprisonment penalty is in line with penalties for similar offences within the *Corporations Act 2001*, such as section 595 relating to the offence of giving or offering of an inducement to be appointed as a liquidator of a company.

However, I acknowledge the current penalty of three months' imprisonment does not comply with the *Guide to Framing Commonwealth Offences* (the Guide). I thank the Committee for bringing this matter to the Attorney-General's attention.

The Attorney-General will seek to amend new subsections 185EC(6), 185MC(6) and 185PC(6) to ensure compliance with the Guide by increasing the maximum penalty to six months' imprisonment.

Greg Hunt
Acting Attorney-General

The Hon Dan Tehan MP

Minister for Social Services

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7560

MC18-002182

19 APR 2018

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Polley~~ Helen,

Thank you for your letter of 22 March 2018, regarding the Standing Committee for the Scrutiny of Bills' consideration of the *Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018* (the Bill).

I appreciate the Committee's consideration of the Bill and am pleased to have the opportunity to address the issues raised by the Committee. In particular, the Committee sought more detailed advice as to why it is considered necessary and appropriate to allow the disclosure and the taking into account of a person's entire criminal history, including:

- minor offences, and offences that may not be relevant to a person's suitability as a disability worker; and
- wrongful convictions for which a person has been pardoned, and convictions that have been quashed.

I welcome the opportunity to respond to the Committee's comments and provide the following advice.

Reasons for including minor offences and their relevance to suitability

The Committee has acknowledged the importance of protecting persons with disabilities from violence, abuse, exploitation and neglect. People with disability are some of the most vulnerable within the Australian community. It is not only sexual or violent offences that the worker screening regime seeks to mitigate against. Individuals employed within the NDIS are in a position of trust and in many cases will have access to the person with disability's personal belongings, finances and medication. Minor offences may be relevant to a

person's integrity and general trustworthiness. On that basis, it is appropriate to have awareness of the circumstances of surrounding even minor offences.

It should be recognised that the fact that an individual may have a criminal conviction for a minor offence which occurred a long time ago forms only one part of the analysis and risk assessment undertaken by a state or territory worker screening unit. It will not necessarily prohibit that person from gaining employment with a provider within the NDIS.

Limiting the categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit and could undermine the value of an NDIS worker screening outcome as a source of information for people with disability and for employers. Inaccurate risk assessments may also be unfair to workers themselves.

State and territory worker screening units will be required to undertake a rigorous process to determine the relevance of a particular event to whether an applicant for an NDIS Worker Screening Check poses a risk to people with disability. In particular, worker screening units are required to consider:

- the nature, gravity and circumstances of the event and how it is contributes to a pattern of behaviour that may be relevant to disability-related work;
- the length of time that has passed since the event occurred;
- the vulnerability of the victim at the time of the event and the person's relationship to the victim or position of authority over the victim at the time of the event;
- the person's criminal, misconduct and disciplinary, or other relevant history, including whether there is a pattern of concerning behaviour;
- the person's conduct since the event; and
- all other relevant circumstances in respect of their offending, misconduct or other relevant history, including attitudes towards offence or misconduct, and the impact on their eligibility to be engaged in disability-related work.

Safeguards will be in place through a nationally consistent, risk-based approach that will provide state and territory worker screening units with a framework for considering a person's criminal history and patterns of behaviour over a lifetime that would indicate potential future risk to people with disability. The more complete the information about patterns of behaviour, the more accurate the assessment of risk. Even offences that are minor, not violent or sexual in nature, are not directly related to disability employment or happened some time ago, contribute to an assessment of risk.

Limiting the categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit and could undermine the value of an NDIS worker screening outcome as a source of information for people with disability and for employers. Inaccurate risk assessments may also be unfair to workers themselves.

I note that Working with Children Checks already operate in all jurisdictions with access to, and assessment of, full criminal history. People with disability deserve the same level of protection.

Reasons for including pardoned and quashed convictions

The Committee also raises the issue of access to information on spent, quashed and pardoned convictions. Research supports criminal history, including spent, quashed or pardoned convictions, as a key indicator of past patterns of behaviour.

Ensuring that state and territory worker screening units are provided with a complete picture of an individual's criminal history information will ensure that the risk assessment process is as accurate and well-informed as possible. This will not be known until the specific circumstances surrounding the pardoned or quashed conviction are considered by the worker screening unit, which is why they need access to such information as proposed in the Bill.

However, there may be other circumstances where an individual has had a conviction quashed on other grounds, often on appeal to a superior court, which will not necessarily be indicative that they are legally or factually innocent of the offence.

Including quashed and pardoned convictions provides a more complete picture of a person's history and contributes to a more accurate risk assessment. An accurate assessment benefits both people with disability and the worker being screened. Again, such an assessment would be rigorous and consider the circumstances surrounding this history to determine its relevance to the overall risk assessment.

This is why the Working with Children Check currently undertakes a review of spent, quashed and pardoned convictions.

Thank you for bringing these matters to my attention. I trust this information is of assistance to the Committee and look forward to the Committee's final report.

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS18-000673

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to correspondence dated 15 February 2018 from Anita Coles, Committee Secretary, regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the Identity-matching Services Bill 2018 (the Bill).

As set out in the Committee's *Scrutiny Digest No. 2 of 2018*, the Committee has sought additional information about a number of matters in relation to the Bill. I have considered the comments made by the Committee and will be proposing amendments to the Bill to address some of the Committee's concerns. My responses to each of the specific the issues raised by the Committee are detailed below.

Privacy safeguards in policy and administrative arrangements

The Committee has sought my advice as to whether all or any of the intended policy and administrative safeguards identified in the explanatory materials can be included as legal requirements in the Bill or, at a minimum, that there be a requirement in the Bill that such safeguards be implemented by agencies seeking to access identification information.

The identity-matching services referred to in the Bill are supported by a broad system of controls and arrangements that govern the provision and use of the services. This includes the *Intergovernmental Agreement on Identity Matching Services* (the IGA) signed by the Prime Minister and first ministers of each of the states and territories in October 2017, and the formal data-sharing agreements between the Department of Home Affairs (the Department) and each of the participating agencies.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

The Bill is just one aspect of these arrangements, and forms part of a broader network of legislation, both Commonwealth and state/territory, that will govern the sharing of identification information through the services. The Bill is primarily intended to provide the Department with the legal authority to operate the interoperability hub through which the majority of the services are transmitted, and to host of the National Driver Licence Facial Recognition Solution (NDLFRS), which will make state and territory driver licences available through the services.

The Committee has noted that the Bill does not set out what an agency which receives information through the services does with the information following its receipt. The Bill does not seek to, nor does it, authorise other agencies to share information through the services. Each agency's use of information it receives through the services will be governed by its own legal authority to collect, use and disclose the information for particular purposes, including any legislated protections that apply to the agency under Commonwealth, state or territory privacy legislation.

By taking this approach, the Bill avoids providing a blanket authorisation for all information-sharing that occurs through the services. Where an agency seeks to obtain information from another agency through the services, both the requesting agency and data-holding agency will need to have a legal basis to share information with the other. This is no different to current data-sharing arrangements. Much of the information-sharing that will occur through the services is already taking place based on existing legal authorities and using existing systems. The Bill will simply enable the Department to develop and operate the technical systems needed to offer agencies the tools to conduct their information-sharing in a more secure, accountable and auditable way.

The Government considers that the protections already contained in the Bill, and the obligations imposed by the IGA, provide a strong degree of protection for the information transmitted through the identity-matching services. The Bill is appropriately focused on providing authorisations that are required by the Department in order to operate the systems supporting the services, and place appropriate safeguards around the operation of those systems by the Department. Any expansion of this scope to regulate users of the services, or otherwise impose obligations on other entities will add significant complexity to the Bill and may be inconsistent with, or unnecessarily duplicate, other Commonwealth, state and territory legislation that already regulates the handling of information by the various users of the services.

Consideration of submissions by Human Rights Commissioner and Information Commissioner when making rules

The Committee has also sought my advice as to the appropriateness of amending the Bill to provide that the Minister must, after consulting the Human Rights Commissioner and the Information Commissioner, have regard to any submissions made by those commissioners prior to making any rules; and, if the Minister makes rules that are inconsistent with the advice provided by the commissioners, that the Minister provide reasons explaining why the rules depart from that advice.

The requirements already contained in the Bill to consult with the Human Rights Commissioner and the Information Commissioner when making rules are important accountability measures that will ensure that human rights and privacy issues are appropriately considered. The additional requirements recommended by the

Committee would be an appropriate addition to these measures that will further enhance their efficacy. I accept the Committee's proposal in this regard, and will propose government amendments to this effect.

The appropriateness of rules rather than regulations

The Committee has also sought my advice as to why it is appropriate to include additional types of identification information or new identity-matching services in rules rather than regulations.

I am advised that the use of rules rather than regulations is consistent with the Office of Parliamentary Counsel's *Drafting Direction No. 3.8 – Subordinate Legislation*. Paragraph 2 of that Drafting Direction states that:

> "OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so".

Consistent with paragraph 16 of the Drafting Direction, the approach of including new identification information or identity-matching services in rules rather than regulations has a number of advantages including:

- it facilitates the use of a single type of legislative instrument when needed for the Act, thereby reducing the complexity that would otherwise exist if different matters were to be prescribed across more than one type of instrument,
- it enables the number and content of legislative instruments made under the Act to be rationalised,
- it simplifies the language and structure of the provisions in the Bill that provide the authority for the legislative instruments, and
- it shortens the Bill.

Due to these advantages, paragraph 17 of the Drafting Direction states that drafters should adopt this approach where appropriate with new Acts.

The Drafting Direction states that matters such as offence or civil penalty provisions, powers of arrest, detention, entry, search or seizure, the imposition of a tax, appropriations, and amendments to the text of an Act should be included in regulations unless there is a strong justification for prescribing those provisions in another type of legislative instrument. The Bill does not enable rules to include any of these types of provisions, and subclause 30(2) of the Bill specifically prohibits this for the avoidance of doubt. As rules made under the Bill will not be able to provide for these matters, it is appropriate that the matters that *are* able to be prescribed under the Bill are prescribed in rules rather than regulations.

In addition, clause 30 clarifies that rules made under the Bill will be legislative instruments for the purpose of the *Legislation Act 2003*. Under sections 38 and 39 of that Act, all legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within 6 sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the rules will be subject to the same level of Parliamentary scrutiny as regulations, including consideration by the Senate Standing Committee on Regulations and Ordinances. Subclauses 30(3) and (4) further clarify that rules made under the Bill will be subject to disallowance and sunsetting, even though they would otherwise be exempt from

these requirements because the Bill facilitates the operation of a scheme involving the Commonwealth and one or more States.

These measures will ensure that appropriate oversight mechanisms are in place for any rules made under the Bill.

The use of an offence-specific defence

The Committee has sought my advice on why it is proposed to reverse the evidential burden of proof in relation to an offence contained in the Bill. Specifically, the Bill contains an offence for the unauthorised disclosure or recording of protected information by entrusted persons (i.e. staff or other persons working for the Department of Home Affairs). The Bill contains an exception to this offence where the conduct is authorised by, or is in compliance with a requirement under, a Commonwealth, State or Territory law. By including this as an exception to the offence, the Bill places the evidential burden of proof on a defendant to establish that their disclosure or recording of protected information was authorised under law, rather than placing the onus on the prosecution to establish that the conduct was not authorised under law. This is contrary to the standard approach that the prosecution must establish all elements of a criminal offence.

The Committee notes that the explanatory material to the Bill does not address this issue, and that the Committee's consideration of the appropriateness of the provision would be assisted if this material explicitly addressed relevant principles set out in the *Guide to Framing Commonwealth Offences* (the Guide).

The offence in clause 21 of the Bill has been designed to provide the greatest possible protection to the protected information contained in, transmitted through, or related to, the systems that support the identity-matching services. In developing the offence, consideration was given to the best-practice guidance in the Guide. The Guide specifically states that offence-specific defences should only be included in very limited circumstances, namely where the relevant facts are peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. The provision in the Bill meets these requirements.

For the offence contained in the Bill to be effective, it must be able to be prosecuted. If the defence in subclause 21(2) was included as an element of the offence itself, it would be extremely difficult for the prosecution to establish that the conduct was not authorised under any law of the Commonwealth, or a State or Territory. This could require the prosecution to examine a very large array of legislation in order to establish that there was no authorising law in the particular circumstance to the requisite burden of proof.

By contrast, it would be expected that an entrusted person with access to information in, or about, the systems, would be aware of the authorisation upon which they are relying when disclosing that information. This authorisation should be clearly documented for the particular disclosure, or would be contained in policy, procedural or legal arrangements governing business-as-usual disclosures. Any decision taken by an entrusted person to disclose protected information should be based on one or more legislative authorisations, and the particular authorisation relied on in a particular case will be known to the entrusted person.

As such, it would be considerably less onerous for the defendant to positively establish the specific legislative authorisation for their disclosure in each particular case, than for the prosecution to prove that they had no authorisation for the disclosure under any law.

The Bill has been developed to ensure that disclosure of protected information is appropriately restricted to protect the privacy of individuals whose personal and sensitive information is contained within, or transmitted via, the systems operated by the Department. In placing the burden of proof in relation to the defence on the defendant, subclause 21(2) places the onus on each entrusted person to ensure, in all circumstances, that their level of care when handling the information (including their regard to the legislative authorisations they have to disclose the information) is commensurate with the sensitivity of the information concerned. I also note that the drafting of this defence is consistent with secrecy provisions designed to protect other types of particularly sensitive information in other Commonwealth legislation, such as the *Australian Border Force Act 2015.*

Annual reporting

The Committee has sought my advice as to the appropriateness of amending clause 28 of the Bill (which sets out the matters to be included in an annual report on the operation of the scheme) to include a requirement to report on the number of instances in which an entrusted person discloses protected information pursuant to clauses 23 (disclosure to lessen or prevent threat to life or health) and 24 (disclosure relating to corruption issue).

The annual reporting requirements in the Bill will ensure that the public has appropriate visibility of the provision of identity-matching services by the Department. Although reporting on disclosures made under clause 23 does not go to the use of the services themselves, I accept the Committee's comments that such disclosures have privacy implications and should be transparent. As such I will propose an amendment to the Bill to accommodate this proposal.

In relation to reporting on the number of disclosures relating to corruption issues, the Department has consulted with the Attorney-General's Department, which administers the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act). Consistent with their advice, which was informed by consultation with the Australian Commission for Law Enforcement Integrity (ACLEI).

A reporting requirement of this nature has the potential to jeopardise the confidentiality of disclosures made to the Integrity Commissioner under clause 24 of the Bill. Under the Bill, an entrusted person may make a disclosure to the Integrity Commissioner without the Secretary's knowledge. It would be inappropriate to amend the Bill to require an entrusted person to notify the Secretary of any disclosure made by them under clause 24 in order for the Secretary to accurately report on these disclosures. This would remove entrusted persons' ability to make confidential disclosures to the Integrity Commissioner, and may have the effect of deterring them from making corruption-related disclosures altogether. This may have a negative impact on the effective operation of the LEIC Act, which is essential to the detection, prevention and prosecution of corruption-related issues.

I also note that any disclosure made under clause 24 would already be captured by the extensive reporting requirements already imposed upon the Integrity

Commissioner under the LEIC Act. This is a more appropriate reporting mechanism for this type of information, which does not compromise the confidentiality of disclosures made to the Integrity Commissioner. Therefore, I do not consider it appropriate to add this to the reporting provisions in the Bill.

I thank the Committee for the opportunity to clarify these matters, and for its important work in considering legislation before the Parliament. I have copied this letter to the Chairs of the Parliamentary Joint Committees on Intelligence and Security, and Human Rights.

Yours sincerely

04/04/18

PETER DUTTON

Senator the Hon Marise Payne
Minister for Defence

MC18-000742

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Polley~~ Helen

Thank you for your letter of 22 March 2018 regarding the interest of the Senate Standing Committee for the Scrutiny of Bills in the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018.

As you would be aware, the Bill received bi-partisan support and was passed without amendment by the parliament on 28 March 2018.

Notwithstanding the Bill's passage through the parliament, I am pleased to provide the enclosed advice regarding your committee's specific questions regarding the operation of particular provisions of the legislation.

I trust this information is of assistance.

Yours sincerely

MARISE PAYNE
Encl
13 APR 2018

Advice to the Senate Standing Committee for the Scrutiny of Bills in response to questions regarding the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018

Question:

The committee requests the minister's advice as to why it is necessary to allow the powers and functions of the Director-General under the proposed Part 5A to be delegated to Executive Level 1 employees or above, rather than to members of the Senior Executive Service.

Answer:

Accountable Officers routinely have delegation powers to assist them in the effective and efficient running of their organisations. This is a sensible and prudent business practice.

I note the Committee's stated preference that delegation powers be normally limited to Senior Executive Service officers.

Importantly, the delegation power only relates to Part 5A of the Act which sets out employment arrangements for staff; it does not extend to operational matters which appropriately remain with the Director-General of the Australian Signals Directorate.

The Australian Signals Directorate operates a range of sophisticated technical capabilities and systems. Similarly, there are a number of secondments to partner agencies, as well as other bodies and organisations, that need to exercise delegations, and these secondment arrangements occur at a range of employment categories and levels. In this context, the expertise regarding the use and engagement of staff for how these capabilities and systems can be best applied and used to meet the Government's requirements at times rests with officers outside of the Senior Executive Service.

The proposed delegation power for the Director-General of the Australian Signals Directorate, which is limited to Part 5A, is intended to be used sparingly, and only after careful consideration has been applied as to what the activity is and the outcomes required. Strict boundaries will be set on the extent and limitations of the delegated powers or functions, along with the requirements for how the officer is to exercise those delegations.

In preparing this provision within the Act, careful consideration was taken as to the appropriate limit of the delegation, such as restricting it to officers at the Executive Level 1 classification or higher. I would further note that Executive Level 1 officers – while not fulfilling the types of leadership roles undertaken by Senior Executive Services officers – do fill senior positions and have significant responsibilities.

While the Director-Generals of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service both have similar delegation powers, these are without restriction as to the level of employee able to receive the delegation.

While the proposed provision seeks to provide the same broad delegation function to the Director-General of the Australian Signals Directorate that his intelligence counterparts have, the delegation function has been limited. In this context, an appropriate balance has been found in providing this necessary flexibility to the Director-General of the Australian Signals Directorate, but importantly limiting it to Executive Level 1 officers and above.

Question:
The committee requests the minister's advice as to why it is considered necessary and appropriate to provide the Director-General with a broad discretion as to the purposes for which AUSTRAC information may be communicated with a foreign intelligence agency.

Question:
The committee also requests the minister's advice as to the appropriateness of amending the bill so as to include high-level guidance as to the purposes for which AUSTRAC information may be communicated to a foreign intelligence agency.

Combined Answer:
The new section 133BA for the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* includes a very important consequential amendment as a result of the Australian Signals Directorate becoming an independent statutory agency.

At present the Australian Signals Directorate is part of the Department of Defence and is covered by the Department's own provision within *the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.* As the Australian Signals Directorate will be becoming its own entity on 1 July 2018 it now requires its own listing under this Act.

This amendment to the Act does not extend or alter the current arrangement the Australian Signals Directorate receives by being part of the Department of Defence. Similarly, it is consistent with arrangements provided for all other intelligence and security agencies who require this function.

In this context, there already exists strong compliance safeguards and the Australian Signals Directorate is subject to some of the most rigorous oversight arrangements in the country. This includes being subject the oversight of the Inspector-General of Intelligence and Security, who has the powers of a standing royal commission and can compel officers to give evidence and hand-over materials. The Inspector-General regularly reviews activities to ensure the Australian Signals Directorate's rules to protect the privacy of Australians are appropriately applied.

This amendment made to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* is critical to the Australian Signals Directorate's work to combat terrorism, online espionage, transnational crime, cybercrime and cyber-enabled crime.

As an independent statutory agency, this amendment now ensures that information is able to be appropriately shared, consistent with how other Australian domestic intelligence and security agencies manage this type of information. This work across the intelligence and security community is central to defending Australia and its national interests.

In relation to the committee's further suggestion regarding whether it is necessary to amend the Bill to provide high-level guidance as to the purposes for which AUSTRAC information may be communicated to a foreign intelligence agency, I can advise that this is not necessary. This amendment is not, in effect, creating a new arrangement for the Australian Signals Directorate. These provisions reflect longstanding arrangements for agencies in the intelligence and security community, and there are strong safeguards in place, including the powers of the Inspector-General of Intelligence and Security, as noted above, to ensure the function is appropriately exercised.

TREASURER

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your Committee's correspondence of 22 March 2018 to my office. The Committee requested that I respond to its comments on the National Housing Finance and Investment Corporation Bill 2018 that are contained in the Committee's *Scrutiny Digest No. 3 of 2018*.

The Committee seeks my advice in relation to:

- Parliamentary guidance and scrutiny of the National Housing Finance and Investment Corporation's (NHFIC's) provision of grants to the States and Territories; and
- the scope of the NHFIC CEO's delegation powers.

Grants to the States and Territories

The Committee notes that section 96 of the Constitution confers on the Parliament the power to make grants of financial assistance to the States and to determine the terms and conditions attaching to such grants and suggested that it may be appropriate for the Bill to: include some high-level guidance as to the terms and conditions under which financial assistance may be granted by the NHFIC to the States and Territories; and subject the NHFIC investment mandate to disallowance.

References to grants to States and Territories

The object of the NHFIC is to improve housing outcomes for Australians, and it will achieve this through the administration of three programs: the Affordable Housing Bond Aggregator, the National Housing Infrastructure Facility (NHIF) and capacity building activities. The Affordable Housing Bond Aggregator and capacity building activities are only available to registered community housing providers. In terms of the $1 billion allocation for the NHIF, there is a limited amount of grant funding available ($175 million), and most finance will be in the form of loans.

The Bill provides that the NHFIC's functions include granting financial assistance to the States and Territories to improve housing outcomes and determining terms and conditions for such grants of financial assistance. This is included to provide flexibility in the way payments are made to eligible project proponents and to reflect the constitutional powers which support the NHFIC's functions.

Guidance on terms and conditions

The approach taken with regard to the NHFIC is consistent with other Commonwealth bodies tasked with providing financial assistance to the States. Parliament can and does delegate its power under section 96 of the Constitution to determine terms and conditions attaching to grants of financial assistance. A recent example is the *Northern Australia Infrastructure Facility Act 2016*, in which Parliament delegated this power to the Facility, which operates commercially and is governed by an independent Board. Another example is the annual even-numbered Appropriation Acts, which appropriate amounts to be paid to the States under section 96 of the Constitution and enable the Minister to determine the terms and conditions that apply to such payments.

The Board of the NHFIC will be independent and appointed based on relevant skills and experience. The Board will be equipped to decide whether to provide a loan or grant, or make an equity investment, to support the construction of housing-enabling infrastructure (such as new sewerage infrastructure). It will apply commercial discipline and its expertise to decide which projects to fund in light of the objectives of the NHFIC to improve housing outcomes for Australians, and consistent with the terms of the investment mandate.

The investment mandate will provide guidance to the NHFIC on its operations, including the types of projects that are eligible for NHIF finance, the types of loan concessions that the NHFIC can provide and criteria for making NHIF financing decisions. Providing the details in the investment mandate rather than in the Bill provides flexibility to allow the NHFIC to respond to evolving market conditions. The draft investment mandate specifies a number of factors that the Board must take into account when making a NHIF financing decision, including the likely impact of the project on the supply and ongoing availability of affordable housing.

While specific terms and conditions for grants of financial assistance to the States and Territories are not included in the Bill or the draft investment mandate, eligibility and decision making criteria which apply generally are provided in the latter. That is, the guidance to be provided in the investment mandate will apply to all finance provided by the NHIF, irrespective of the project proponents.

Disallowance of the NHFIC investment mandate

Like other legislative instruments, the investment mandate is required to be tabled in Parliament and registered on the Federal Register of Legislative Instruments. This enables the public and Parliament to hold the Government accountable for the directions it issues to the Board.

However, I do not consider that subjecting the investment mandate to parliamentary disallowance is appropriate. The investment mandate should provide certainty to both the Board and the market about the way in which the NHFIC is to exercise its functions and powers. This certainty would be delayed if the mandate is disallowable. In addition, in the event that an objection is raised and the mandate ceases to operate, the Board would be placed in a very difficult situation leading to significant uncertainty and impracticality.

I also draw the Committee's attention to the fact the Government has undertaken extensive public consultation at every stage of the development of the NHFIC Bill and investment mandate.

Finally, I note that this approach is consistent with legislation such as the *Northern Australia Infrastructure Facility Act 2016*, the *Clean Energy Finance Corporation Act 2012* and the *Future Fund Act 2005*.

Scope of CEO delegation powers

The Bill provides for the delegation of functions by the NHFIC and by the Board to the CEO, and for the delegation and sub-delegation by the CEO to a senior member of the NHFIC staff.

The Committee requested advice as to the intended meaning of 'senior member' of the NHFIC staff, and whether the Bill or explanatory memorandum could be amended to provide some guidance as to the staff levels and skills of staff considered to be senior members of staff.

It is not unusual for Commonwealth entities to be permitted to delegate statutory powers and functions to individual members of staff. Indeed, it is generally considered necessary to include a delegation power in relation to an entity and its CEO. Some precedents include the Export Finance and Insurance Corporation and the Regional Investment Corporation.

The NHFIC will need to have in place appropriate governance and supervisory arrangements for all staff. Subject to this expectation, I consider that it is appropriate for the NHFIC, as an independent corporate Commonwealth entity, to determine its staffing arrangements and structure. What constitutes a 'senior member' of the NHFIC's staff according to the ordinary meaning of the term will need to be determined in the context of the staffing arrangements and structure the NHFIC adopts.

It will be the NHFIC's responsibility to ensure that only those senior staff with appropriate qualifications and experience, and relevant training, are delegated functions. I am confident that the NHFIC will appropriately balance its risks in relation to delegations and do not consider that the Bill or explanatory memorandum require amendment to deal explicitly with this matter.

I hope this information will be of assistance to the Committee.

The Hon Scott Morrison MP

26 / 4 / 2018

ASSISTANT MINISTER TO THE TREASURER

Senator the Hon Helen Polley
Chair, Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

A representative of the Senate Scrutiny of Bills Committee wrote to my office on 22 March 2018 requesting a response from me in relation to issues raised in *Digest No.3 of 2018* regarding Treasury Laws Amendment (2018 Measures No. 3) Bill 2018.

Schedule 2 to the bill seeks to amend the *Competition and Consumer Act 2010* to provide protection, through a 'safe harbour' defence, for egg producers who comply with the requirements of the *Free Range Egg Labelling Information Standard.*

The Committee has sought advice as to the appropriateness of reversing the evidential burden of proof in relation to the safe harbour defence in proposed section 137A, noting that the offence and civil penalty provisions to which the defence applies carry significant financial penalties.

The reverse burden of proof was considered to be appropriate for a number of reasons. In the past, producers who chose to label their eggs 'free range' were not required to adhere to prescribed mandatory requirements. It will now be the case that, should producers choose to label their eggs 'free range', they must be able to prove that they have met the requirements of the *Free Range Egg Labelling Information Standard*. Producers would generally prove that they have met these requirements by gathering information through daily monitoring of hens and record keeping. This information is within the producers' knowledge and there would be no additional burden on producers to produce it as evidence should the need arise.

If the burden of proof for the safe harbour was not reversed, the regulator would be required to undertake costly and difficult investigations. In some cases the regulator may have some difficulty accessing properties, would only be able to observe the hens on sporadic occasions, may face health and safety difficulties and could pose biosecurity risks when visiting farms.

I hope this information will be of assistance to the Committee.

Yours sincerely

The Hon Michael Sukkar MP

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 4847 | Facsimile: 61 2 6273 4862

Minister for Revenue and Financial Services

Minister for Women

Minister Assisting the Prime Minister for the Public Service

The Hon Kelly O'Dwyer MP

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~ Helen

Thank you for the letter to my Office on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 22 March 2018, drawing my attention to the Committee's *Scrutiny Digest No. 3 of 2018* which seeks further information about the Treasury Laws Amendment (Illicit Tobacco) Bill 2018 (the Bill).

The Committee has sought further information about two matters relating to the new offences created in the Bill, namely:

- the application of absolute liability, rather than strict liability, to the elements of the offences relating to the weight of the tobacco and the existence of reasonable suspicion that excise or excise-equivalent customs duty was required to be paid and has not been paid; and
- the appropriateness of a number of offence-specific defences created in the Bill that reverse the evidential burden of proof.

Absolute liability

Proposed Subdivisions 308-A and 308-B create a range of offences that would apply to individuals that possess or otherwise deal with illicit tobacco. As the Committee notes, some elements of these offences, including those elements relating to the weight of the tobacco, and whether a reasonable suspicion exists that excise or excise-equivalent customs duty has not been paid, are subject to absolute liability.

The Committee has sought more detailed justification for why these offences should not be subject to strict, rather than absolute, liability which would instead permit a defence of mistake of fact.

I consider that, consistent with the Guide to Framing Commonwealth Offences, that both matters are pre-conditions of the offence for which the defendant's state of mind is not relevant.

In the case of the weight of the tobacco, this is because the weight of the tobacco is an objective and important indicator of the seriousness of such offences. Consistent with the approach taken for offences involving commercial or marketable quantities of drugs, if a person holds or otherwise deals with the requisite quantity of tobacco it is appropriate and intended that the specified criminal and civil consequences should apply, even if the person mistakenly believed the quantity of tobacco involved was smaller.

A potential imprisonment term applies for illicit tobacco offences for quantities of tobacco weighing 250 kilograms or more. As offences of this nature require large scale activities and organisation it is appropriate that absolute liability apply to the weight of the tobacco. Similarly, illicit tobacco offences involving tobacco weighing five kilograms or more are subject to a criminal offence for which a monetary penalty only applies. Five kilograms of tobacco represents the equivalent of 7,000 cigarettes with excise duty of over $4,500 applicable based on current duty rates and is a significant amount of tobacco. Given the highly regulated nature of tobacco, it would also be expected that any person controlling tobacco of this weight would be aware that serious consequences arise from possessing this quantity of tobacco without reason to believe that duty has been paid.

In this respect, it should be noted that these offences either require the prosecution to prove that duty was required to be paid and has not been paid on the tobacco or include a defence that will apply if the individual reasonably believed duty had been or was not required to be paid. Given this, a person can only be convicted of this offence as a result of a mistaken belief about weight if they either knew duty had not been paid or did not reasonably believe that duty was paid on the tobacco.

It should also be noted that the possessing or importing of any quantity of excisable or dutiable goods (including tobacco) remain offences under the *Excise Act 1901* and the *Customs Act 1901*.

In the case of reasonable suspicion, as the Committee notes, this element is also an entirely objective matter going to the circumstances in which the tobacco is held or otherwise dealt with rather than about the state of mind of the defendant. It is not relevant whether the defendant had a reasonable suspicion or was aware of the factor or factors that gave rise to the suspicion, merely that the factor or factors existed.

I understand the Committee has concerns that this may mean that a person may be convicted of the offence despite reasonably but mistakenly believing that a reasonable suspicion could not exist and therefore believing that the excise or customs duty had been paid.

All of the offences for which reasonable suspicion is an element of the offence include a defence that will apply if a person reasonably believes that duty has been paid or was not required to be paid, for whatever reason. This defence goes beyond the defence of mistake of fact and ensures that a person will not be subject to the offence even if the person may be aware of a factor that might give rise to a reasonable suspicion (such as a defect in packaging).

To the extent that a person may have made a mistake of fact about a matter giving rise to reasonable suspicion, but does not believe that duty has been paid or was not payable, then their mistake does not affect their culpability but only to the circumstances. It would not, for example, be appropriate, for a person's belief that they have properly packaged illicit tobacco to allow them to escape liability for an offence in relation to tobacco on which they believe duty has not been paid.

Defences

Proposed Subdivision 308-A and 308-B create a range of offences that would apply to individuals that possess or otherwise deal with illicit tobacco.

As noted by the Committee, the Bill would also establish a range of defences to these offences, applying broadly if the tobacco is held, moved or otherwise dealt with under a permission, authority or licence that permits such dealings. The offences in Subdivision 308-A, which apply where there is a reasonable suspicion that excise or excise-equivalent customs duty was required to be paid and has not been paid also provide for a defence that would apply if excise or excise-equivalent customs duty has been paid or was not required to be paid on the tobacco, or the person reasonably believes that this was the case.

The Committee has sought further justification for why these defences are not instead elements of the offence.

I consider that the approach in the Bill is appropriate as the matters covered by the defences are peculiarly within the knowledge of the defendant and would create practical challenges for the prosecution to disprove.

In the case of the permission authority and licence defences, there are a wide range of provisions under which a person may have legal authority to hold, transport or otherwise deal with tobacco. Many of the provisions provide for ongoing or continuing authorities and apply both to activities of a person and their agents.

If tobacco is found in a defendant's possession, knowledge about the existence of any relevant authorisation (or at least of where details of such an authority may be obtained) will be peculiarly within the knowledge of the defendant. Absent evidence from the defendant, the prosecution will not have any knowledge about whether any specific provisions may apply but would need to consider each of the potentially applicable permissions. Checking a quantity of tobacco against each potentially applicable authorisation would impose a very significant burden on the prosecution that would be impractical to administer.

In the case of defences relating to excise or excise-equivalent customs having been paid or the defendant reasonably believing that this is the case, as the Explanatory Memorandum to the Bill outlines in paragraphs 1.11 to 1.12 and 1.46 to 1.48, the new 'reasonable suspicion' offences are being introduced in part because of evidentiary challenges proving these matters in relation to existing offences. Specifically, enforcement agencies advised that where tobacco was found in Australia, there were significant practical obstacles proving whether tobacco was illegally produced or manufactured in Australia (and so should have been subject to excise) or illegally imported to Australia (and so should have been subject to excise-equivalent customs duty).

Given this, including these elements or a similar element going to whether the defendant reasonably believed that duty had been or was not required to be paid in the new reasonable suspicion offences would have replicated existing problems. Instead, noting that details about the origins of the tobacco and the defendant's beliefs are readily accessible to the defendant, these matters have been addressed through the inclusion of specific defences.

I appreciate the Committee's consideration of the Bill and trust this information will be of assistance to the Committee.